

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 6**

**UPMC AND ITS SUBSIDIARY, UPMC
PRESBYTERIAN SHADYSIDE, SINGLE
EMPLOYER, D/B/A UPMC PRESBYTERIAN
HOSPITAL AND D/B/A UPMC SHADYSIDE
HOSPITAL**

Case 06-CA-171117

and

**SEIU HEALTHCARE PENNSYLVANIA,
CTW, CLC**

**UPMC AND ITS SUBSIDIARY UPMC
CHILDREN'S HOSPITAL, A SINGLE
EMPLOYER**

Case No. 06-CA-171126

and

**SEIU HEALTHCARE PENNSYLVANIA,
CTW, CLC**

**UPMC AND UPMC MERCY HOSPITAL, A
SINGLE EMPLOYER D/B/A/ MERCY HOSPITAL**

Case No. 06-CA-171621

and

**SEIU HEALTHCARE PENNSYLVANIA,
CTW, CLC**

**UPMC MERCY HOSPITAL, UPMC PRESBYTERIAN SHADYSIDE,
AND CHILDREN'S HOSPITAL OF PITTSBURGH OF UPMC'S
NOTICE OF SUPPLEMENTAL AUTHORITY**

Respondents UPMC Mercy Hospital, UPMC Presbyterian Shadyside, and Children's Hospital of Pittsburgh of UPMC (collectively "Respondents") submit this Notice of Supplemental Authority to direct the National Labor Relations Board ("Board")'s attention to Memorandum GC 18-04, issued by the Board's General Counsel on June 6, 2018, which provides detailed guidance regarding enforcement of "Handbook Rules Post-*Boeing*." Exhibit A, Memorandum GC 18-04.

A. The General Counsel's Guidance in Memorandum GC 18-04

In *Boeing*, the Board established a new standard governing the validity of employer rules under the National Labor Relations Act (the "Act"). Under that new standard, when evaluating the legality of an employer rule, the Board must consider: (1) the nature and extent of the potential impact of the rule or policy upon Section 7 rights, and (2) the legitimate justifications associated with the rule. *See The Boeing Company*, 365 NLRB No. 154, slip op. at 2-3 (hereinafter "*Boeing*"). Upon completing this analysis, the rule may be sorted into one of three categories:

- (1) lawful rules, either because (i) when reasonably interpreted, the rule does not interfere with the exercise of NLRA rights or (ii) because the potential adverse impact on NLRA rights is outweighed by justifications associated with the rule;
- (2) rules which warrant individualized scrutiny as to whether the specific rule would prohibit or interfere with NLRA rights, and, if so, whether the impact is outweighed by justifications associated with the rule; and
- (3) rules which would be unlawful as they prohibit or limit NLRA rights, and the impact on NLRA rights is not outweighed by the justifications associated with the rule.

Id.

On June 6, 2018, the Board's General Counsel, Peter Robb, issued guidance to all Regional Directors, Officers in Charge and Resident Officers of the Board with regard to the application of the Board's new standards (hereinafter, "Memorandum GC 18-04"). This

guidance is intended to govern the enforcement decisions of the regions, particularly in unfair labor practice cases. In Memorandum GC 18-04, the General Counsel interprets the new standards expansively, noting that, in *Boeing*, the Board overturned the presumption that ambiguities in rules should be interpreted against the employer and announced that, going forward, the Board would use an analytically more balanced approach in deciding whether a rule violates the Act. *See* Ex. A, p. 1.

In addition, in Memorandum GC 18-04, the General Counsel notes that the Board in *Boeing* “did not alter well-established standards regarding certain kinds of rules where the Board has already struck a balance between employee rights and employer business interests. For instance, *Boeing* did not change the balancing test involved in assessing the legality of no-distribution, no-solicitation, or no-access rules.” *See* Ex. A, p. 2-3. The General Counsel then cites to language in *Boeing* holding that, under long-standing Board precedent, “employers may . . . lawfully maintain a no-access rule that prohibits off-duty employees from accessing the interior of the employer’s facility and outside work areas, even if they desire access to engage in protected picketing, handbilling, or solicitation.” *See Boeing Co.*, 365 NLRB No. 154, slip op. at 8 (citing *GTE Lenkurt, Inc.*, 204 NLRB 921, 921-922 (1973) and *Tri-County Medical Center*, 222 NLRB 1089 (1976)).

Moreover, in explaining how the new standards should be applied, the General Counsel enumerates several types of rules that fall into “Category 2” and thus must be “evaluated on a case-by-case basis to determine whether the rule would interfere with rights guaranteed by the NLRA, and if so, whether any adverse impact on those rights is outweighed by legitimate justifications.” *See* Ex. A, p. 9. One example of a Category 2 rule is a rule “banning off-duty conduct that might harm the employer.” *See* Ex. A, p. 17.

B. Application of Memorandum GC 18-04 to this Case

GC 18-04 provides additional support for reversing the Administrative Law Judge's ("ALJ") January 18, 2018 Decision. In that case, the ALJ found that Respondent UPMC Mercy Hospital ("Mercy Hospital") violated Section 8(a)(1) of the Act by maintaining and enforcing a solicitation and distribution policy ("S&D Policy"), which restricts off-duty employees' access to the hospital consistent with restrictions on the general public's access to the hospital. Applying the *Boeing* test, the ALJ determined that the S&D Policy would prevent and prohibit employees "not on working time" from engaging in Section 7 activities, and would "strike at the heart" of employees' rights under the Act. The ALJ then classified the rule as falling into "Category 3." Respondents argued in their Brief in Support of Exceptions to the ALJ's Decision that the ALJ misapplied the *Boeing* test by failing to weigh Mercy Hospital's business justifications for its S&D Policy for off-duty employees.

Memorandum GC 18-04 provides additional support for Respondents' position. First, Memorandum GC 18-04 cites to language in *Boeing* holding that employers may "lawfully maintain a no-access rule that prohibits off-duty employees from accessing the interior of the employer's facility and outside work areas, even if they desire access to engage in protected picketing, handbilling, or solicitation." *Boeing Co.*, 365 NLRB No. 154, slip op. at 8. As Respondents have repeatedly argued in this case, Mercy Hospital's S&D Policy is simply a "no-access rule" that allows off-duty employees limited access to hospital property on terms consistent with the general public. In finding that the S&D Policy was unlawful, the ALJ improperly relied on Board precedent holding that employers may not restrict solicitation and distribution by on-duty employees during non-working time at non-working areas of the hospital. ALJ Decision, pp. 16-17 (citing *Beth Israel Hospital v. NLRB*, 437 U.S. 483, 495 (1978); *NLRB*

v. Baptist Hospital, 442 U.S. 773 (1979); *St. John's Hospital & School of Nursing, Inc.*, 222 NLRB 1150 (1976), *enfd.* in part 557 F.2d 1368 (10th Cir. 1977)). On that basis, the ALJ found that the S&D Policy is a “Category 3 rule” under the *Boeing* analysis, because, according to the ALJ, “it prohibits or limits employees’ Section 7 protected conduct.” However, contrary to the ALJ’s findings, the S&D Policy, on its face, does *not* restrict solicitation and distribution by on-duty employees during non-working time but rather limits *off-duty* employees’ access to company property. As Memorandum GC 18-04 explains, the Board in *Boeing* reaffirmed that such a no-access rule is permissible.

Furthermore, Memorandum GC 18-04 clearly states that rules “banning off-duty conduct that might harm the employer” are “Category 2” rules. By limiting off-duty employees’ access to company property, the S&D Policy effectively bans certain conduct by off-duty employees – *i.e.*, entering hospital property “except to visit patients, receive medical treatment, or for other purposes such as are available to the general public.” Thus, under the analysis in Memorandum GC 18-04, the rule should be treated, if anything, as a “Category 2” rule, rather than a “Category 3” rule, as the ALJ found. *See* Ex. A, p. 17. If the S&D Policy is in fact a “Category 2” rule, it must be “evaluated on a case-by-case basis to determine whether the rule would interfere with rights guaranteed by the NLRA, and if so, whether any adverse impact on those rights is outweighed by legitimate justifications.” *See* Ex. A, p. 9. As Respondents have argued, Mercy Hospital, like all hospitals, has a well-established, legally-protected interest in providing patients and patients’ families with quality patient care in an environment free from disturbances. By restricting certain activities unrelated to patient care by off-duty employees, Mercy Hospital is serving these important aims. In contrast, the impact upon employees’ Section 7 rights, if any, is minimal. Under the terms of the S&D Policy, on-duty employees still maintain the right to

solicit or distribute during non-working time in non-working areas. This provides a readily available avenue for employees to engage in solicitation and distribution, and does not infringe upon their Section 7 rights. The restriction simply refines employees' ability to engage in such activity while off-duty in order to ensure that the hospital's operations are not potentially impeded by employees returning to the property and disrupting patient care or the tranquility of the environment. Accordingly, any adverse impact on Section 7 rights clearly is outweighed by Respondents' legitimate justifications.

For the reasons stated above, the General Counsel's Memorandum GC 18-04 further supports Respondents' position that the ALJ erred in finding that Mercy Hospital's S&D Policy is unlawful.¹

Respectfully submitted,

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¹ The three Respondents maintain identical S&D Policies. Accordingly, to the extent that the Board finds that the ALJ erred in finding that Mercy Hospital's S&D Policy is unlawful, the same analysis should apply to the S&D policies at the other two Respondent Hospitals.

Counsel for Respondent
UPMC

Dated: June 13, 2018

CERTIFICATE OF SERVICE

It is certified that a copy of UPMC Mercy Hospital, UPMC Presbyterian Shadyside, and Children's Hospital of Pittsburgh of UPMC's Notice of Supplemental Authority in the above-captioned case has been served by email on the following persons on this 13th day of June, 2018:

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